TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 486

DANTE EDWARD GORI, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 15, 1960
CERTIORARI GRANTED DECEMBER 12, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 486

DANTE EDWARD GORI, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., FEBRUARY 24, 1961

[fol. A]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,

—against—

DANTE EDWARD GORI, Appellant.

On Appeal From the United States District Court for the Eastern District of New York

Appellant's Appendix—Filed January 11, 1960

[fol. 5]

Cr. No. (18 U.S.C., §659)

PAP:sl #90048

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—against—

FRANKLIN OSBORNE CORBETT, DANTE EDWARD GORI,
Defendants.

SUPERSEDING INFORMATION

The United States Attorney Charges:

Count One

That on or about the 11th day of February, 1958, within the Eastern District of New York, the defendants, Franklin Osborne Corbett and Dante Edward Gori, did receive and have in their possession twenty-two (22 cases of women's and children's gloves, of a value of more than One Hundred Dollars ($100), which cases of women's and chil-

dren's gloves had been stolen while moving as part of and constituting an interstate shipment of freight; twenty-one (21) cases having been consigned by Dessy-Atco, 392 Fifth Avenue, New York, New York, to Julius Kayser & Company, Bangor, Pennsylvania, and one (1) case to Elias G. [fol. 6] Krupp, Inc., 308 Mills Street, El Paso, Texas, knowing the same to have been stolen.

Cornelius W. Wickersham, Jr., United States Attorney, Eastern District of New York.

PAP

Feb 3/58 Jan 19/59

[fol. 7]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. 45650.

UNITED STATES OF AMERICA,

—against—

DANTE EDWARD GORI, Defendant.

Excerpts from Testimony before Abruzzo, D.J. on February 4, 1959

Brooklyn, New York,
February 4, 1959.

Before: Honorable Matthew T. Abruzzo, U.S.D.J., and a Jury.

APPEARANCES:

Cornelius W. Wickersham, Jr., Esq., United States Attorney for the Eastern District of New York,

By: Peter Passalacqua, Esq., Assistant United States Attorney.

Nathan Gottesman, Esq., Attorney for Defendant.

• • • • • • •

[fol. 8] EXCERPT FROM GOVERNMENT'S OPENING

Mr. Passalacqua:

. . . . . .

in the morning of February 11th, 1958, these two gentlemen, Corbett and Gori were seen removing cartons of gloves from the basement of Corbett's house in Jamaica, by the F.B.I. agents.

The agents will be here to testify. You will hear their testimony as to the conversations that they had with the defendant, and Corbett, together, in the basement of this house.

. . . . . .

EXCERPT FROM DEFENDANT'S OPENING

Mr. Gottesman:

. . . . . .

There were two men apprehended, as told to you by the Federal attorney, at the time on February 11th, 1958.

The other defendant, he was made a defendant in this information, he pleaded guilty. The merchandise was found at his home in his premises.

The defendant claims, as far as he was concerned, he did not know that the property was stolen. If that is so, he cannot be found guilty in this particular case.

He was there. He admits being there. There was merchandise being loaded on the truck. He says that he was only helping this man for a consideration, just like you and I or anybody else would be earning a day's pay.

. . . . . .

Mr. Passalacqua: May I approach the Bench with Mr. Gottesman just for a moment?

The Court: I think you better not.

Mr. Passalacqua: I have a witness here—

[fol. 9] The Court: Don't make any statements, call your next witness.

. . . . . .

GEORGE STEWART, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Passalacqua:

* * * * * * * *

Q. Are you acquainted with alarm systems that are kept in commercial places?

The Court: I am not interested in that.

Mr. Gottesman: Objection.

The Court: What are you trying to prove, the truck was stolen?

Mr. Passalacqua: Yes.

The Court: You certainly must have better evidence than his investigation.

You got the evidence the truck that wasn't there and you found it some time—you found the truck abandoned two or three days later; and later you found the car.

How much more perfect do you want to make it? Do you want to go through the whole alphabet?

Mr. Passalacqua: That is why I want to approach the bench.

The Court: You know you shouldn't have to approach the bench on that at all. You should know what you are doing.

* * * * * * * *

[fol. 10]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOTICE OF MOTION TO DISMISS SUPERSEDING INFORMATION, ETC.—Filed February 26, 1959

Sir:

Please Take Notice that upon the annexed affidavit of Nathan Gottesman, sworn to the 26th day of February, 1959, and upon all the pleadings and proceedings heretofore

had herein, the undersigned will move this Court at a Special Term thereof at the Courthouse, Washington and Johnson Streets, Borough of Brooklyn, City and State of New York, on the 9th day of March, 1959, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard for an order pursuant to the Federal Rules of Procedure on the following grounds:

1. That the information does not state facts sufficient to constitute an offense against the United States of America.

2. That a mistrial has been declared of the offense charged therein in the case of the United States of America against Dante Edward Gori in the District Court of the Eastern District of New York, case number Cr. 45650., which mistrial has been declared on the 4th day of February, 1959 before Hon. Judge Matthew Abruzzo.

3. That the defendant, Dante Edward Gori, has been placed in double jeopardy pursuant to the law in that the [fol. 11] defendant was previously tried of this offense and a mistrial was declared by the presiding Justice due to no fault on the part of the defendant herein; and for such other, further and different relief as to this Court may seem just and proper:

Dated: Brooklyn, New York, February 26, 1959.

Yours, etc.

Nathan Gottesman, Attorney for Defendant Gori, Office & P.O. Address, 66 Court Street, Borough of Brooklyn, City of New York.

To:

Cornelius W. Wickersham, Jr., United States Attorney for the Eastern District of New York, Federal Building, 271 Washington Street, Brooklyn, N. Y.

[fol. 12]

AFFIDAVIT OF NATHAN GOTTESMAN IN SUPPORT OF MOTION TO DISMISS, ETC.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Nathan Gottesman, being duly sworn, deposes and says:

That he is the attorney for the defendant, Dante Edward Gori, and is familiar with all the proceedings had herein. That this affidavit is made for the purpose of preventing a second trial of the said defendant on the ground that it would be double jeopardy.

The defendant contends that a second trial would be in violation of the Fifth Amendment to the Constitution of the United States and also in violation of the Constitution of the State of New York, Article 1, Section 6, which provides:

> "No person shall be subject to be twice put in jeopardy for the same offense."

The information is as follows: That on or about the 11th day of February, 1958, within the Eastern District of New York, the defendants, Franklin Osborn Corbett and Dante Edward Gori, did receive and have in their possession twenty-two cases of womens' and childrens' gloves, of a value of more than $100.00, which cases of womens' and childrens' gloves had been stolen while moving as part of and constituting an interstate shipment of freight; twenty-one cases having been consigned by Dessy-Atco, 392 Fifth Avenue, New York, New York, to Julius Kayser & Com-[fol. 13] pany, Bangor, Pennsylvania, and one case to Elias G. Krupp, Inc., 308 Mills Street, El Paso, Texas, knowing the same to have been stolen.

That on the 9th day of January, 1959, the above named defendants duly executed waivers of indictment and an information was filed against them on the same day as set forth above in which they are charged with the violation of Title 18, United States Code, Section 659.

That on the 9th day of January, 1959, the defendants were arraigned before Hon. Judge Walter Bruchhausen

and the plea of not guilty was entered in behalf of the defendant, Dante Edward Gori, by your deponent as his attorney. The defendant, Franklin Osborn Corbett, entered a plea of guilty to the information.

The case against the defendant Gori was being tried on February 4, 1959 in this Court before Hon. Judge Matthew Abruzzo. A jury was selected and the attorneys representing both sides opened to the jury and the prosecution called their witnesses to the stand. Three of their witnesses had completed their testimony and while the prosecution's fourth witness was on the stand, Hon. Matthew Abruzzo, the presiding Judge of this Court, directed the Federal Attorney not to ask certain questions that he considered improper. The Federal Attorney did not take heed and persisted in asking the questions that the Court considered improper. That your deponent has in his possession the minutes of the trial herein certified by the Official Court Reporter of this Court containing one hundred seventeen pages which will be submitted to this Court upon the argument of the motion. Patrick Joseph Deery, a witness called on behalf of the Government, was examined and testified:

"Q. Were you alone or were you with another agent? A. No, I was with other agents.

[fol. 14] Q. Where did you see the defendant? A. I saw him in his automobile in the lower part of Manhattan, or Brooklyn.

We observed his automobile at that time.

Q. Do you recall the type of automobile he had? A. Yes, he had a—

The Court: Mr. Passalacqua, please do not get immaterial evidence in here. I admonish you not to. Did you have a talk with him, yes or no?

Mr. Passalacqua: Your Honor, will you please allow me—

The Court: No, I won't allow you to try your case your way, because if you try it your way, we are going to have another mistrial.

Mr. Passalacqua: Your Honor, I think—please allow me.

The Court: I will give you the whole field. When I think you ought to stop, I will stop you. Go ahead, you try your case your own way.

Mr. Passalacqua: Thank you.

Q. Did you observe the defendant on February 11, 1958?

The Court: Excluded.

Mr. Gottesman: Objection.

A. Yes.

Q. When did you see the defendant Gori for the first time?

Mr. Gottesman: Objection.

The Court: That has been already answered, February 10th.

[fol. 15] Q. When did you see him for the second time? A. February—

The Court: Excluded. You haven't even proved he saw him the second time.

Q. Did you see him after February 10, 1958? A. Yes, I did.

Q. Was he alone? A. He met another individual.

Q. Where did you see him on February 11th—

The Court: If you ask one more question that alludes to suspicion, I will withdraw a juror and put this case over to January of next year. Now, I want this crime proved, not nine others.

Mr. Passalacqua: I am not referring—

The Court: That is exactly what you are going to lead this jury to believe.

These agents are helpless. They have got to—Juror No. 1, step out.

I declare a mistrial and I don't care whether the action is dismissed or not.

I declare a mistrial because of the conduct of the district attorney.

Mr. Passalacqua: I am not—

The Court: You heard me. I don't want any more District Attorneys coming down here telling me how I am going to try the cases. And tell your chief, if he doesn't want to put any more cases on before me, it is alright with me.
That's all."

The Court then called a mistrial and withdrew a juror. This was done without the consent of the defendant and was not a condition brought about by the defendant's act. That the defendant at no time consented to declaring a mistrial.

A person has been put in jeopardy once if he has been convicted or acquitted, or if he has been placed on trial and [fol. 16] the jury drawn and the trial has been terminated arbitrarily by the court and without his consent before verdict.

People ex rel. Bullock v. Hayes, 215 N. Y. 172, 109 N. E. 77;
People v. Montlake, 184 App. Div. 578, 172 N. Y. S. 102;
People ex rel. Stabile v. Warden of City Prison of City of New York, 139 App. Div. 488, 124 N. Y. S. 341, affirmed 202 N. Y. 138, 95 N. E. 729;
People v. Goldfarb, 152 App. Div. 870, 128 N. Y. S. 62, affirmed 213 N. Y. 664, 107 N. E. 1083;
People v. Barrett, 2 Caines, 304, 2 Am. Dec. 239;
People ex rel. Jimerson v. Freiberg, 243 N. Y. S. 500, 137 Misc. 314.

And if he has once been in jeopardy on a charge of crime, he may not again be prosecuted for the same crime. Amendments to the Constitution of the United States, Article V; State Constitution, Article 1, Section 6.

That your deponent received a notice from the United States Attorney's Office, dated February 6, 1959, that the above entitled criminal action will be on the 2nd day of March, 1959 for trial at the District Court of the United States for the Eastern District of New York, to be held in Room 727, Federal Building, 271 Washington Street,

Brooklyn 1, New York, and signed by Cornelius W. Wickersham, Jr., United States Attorney.

Wherefore, your deponent respectfully requests that the second trial asked for by the United States Attorney's Office be considered double jeopardy and not be permitted as in violation of my client's constitutional rights.

(Sworn to by Nathan Gottesman on February 26, 1959.)

[fol. 17]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AFFIDAVIT OF PETER A. PASSALACQUA IN OPPOSITION TO MOTION—Filed March 13, 1959

State of New York,
County of Kings—ss.:

PETER A. PASSALACQUA, being duly sworn, says that he is an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such.

This affidavit is submitted in opposition to a motion made by Nathan Gottesman, Esq., counsel for the defendant, Dante Edward Gori, to bar the retrial of the case against defendant Gori on the grounds of double jeopardy.

The facts are as follows: The defendant Gori and codefendant Corbett, are charged with possession of merchandise stolen from an interstate shipment, knowing the same to have been stolen. The codefendant Corbett entered a plea of guilty, and is now awaiting sentence.

The defendant Gori elected to go to trial and on February 4, 1959, a jury trial was commenced before Honorable Matthew T. Abruzzo.

The Government, by Assistant United States Attorney Peter A. Passalacqua, your deponent, called as its first witness one Max Bock whose testimony showed that he was the traffic manager of Desey-Atco, Inc., 392 Fifth Avenue, New York, New York, the owner of the stolen merchandise. That he prepared and issued the Bill of Lading covering

the stolen merchandise, and forwarded the Bill of Lading to the company's hired truckman, Lennie Parness.

[fol. 18] The Government then called its second witness, Mr. Parness, the truckman whose testimony showed that he picked up the subject merchandise at a pier in Brooklyn pursuant to the Bill of Lading, and finding that it was too late to make deliveries, drove his truck containing the merchandise into his garage. That this garage is located on 33rd Street, Brooklyn, and is considered a public garage having space for about 40 trucks.

It is the practice of this garage that after the last truck arrives the garage doors are closed, and the night man leaves the garage unattended until the early morning of the following day.

That on the following morning the witness returned to the garage and did not find his truck or merchandise. That a few days later his truck was found abandoned in Brooklyn, minus the merchandise.

The Government called its third witness, Special Agent of the F. B. I., George Stewart, who testified that on the day following the alleged theft of the truck, he examined the garage and adjacent property. That he noticed two sets of footprints in the snow and that these prints led to a trap door located on the roof of the garage.

That thereafter Special Agent Stewart continued testifying as follows:

Q. This trap door connected the roof to the garage proper itself?

A. Yes, sir, the Arrow Garage.

Q. How big a garage is this Arrow Garage?

A. It covers approximately a half block.

Q. Did you speak to the proprietor of the garage?

A. Yes, sir, I did.

Q. Did you ascertain whether or not—

Mr. Gottesman: I object and move to strike out all the testimony.

The Court: Yes. No conversation.

[fol. 19] Mr. Passalacqua: I am not going into the conversation, your Honor.

The Court: Well, you are going to ask him, did he ascertain a certain fact, and it would lead me to the conclusion that he was going—

Mr. Passalacqua: No. It is something he observed.

The Court: —to ascertain from the owner of the garage.

Mr. Passalacqua: Mr. Gottesman—

The Court: I don't want you to put anything in your question that might lead to a little piece of evidence to the jury. That is why I am trying to stop you.

Did you talk to the owner of the garage, yes or no?

The Witness: Yes, sir.

The Court: That's all.

Q. Are you acquainted with alarm systems that are kept in commercial places?

The Court: I am not interested in that.

Mr. Gottesman: Objection.

The Court: What are you trying to prove, the truck was stolen?

Mr. Passalacqua: Yes.

The Court: You certainly must have better evidence than his investigation.

You got the evidence the truck that wasn't there and you found it some time—you found the truck abandoned two or three days later; and later you found the car.

How much more perfect do you want to make it? Do you want to go through the whole alphabet?

Mr. Passalacqua: That is why I want to approach the bench.

[fol. 20] The Court: You know you shouldn't have to approach the bench on that at all. You should know what you are doing.

Mr. Passalacqua: Mr. Deery, please.

The Court: Is this another agent?

Mr. Passalacqua: Yes.

The Court: The same thing as the last?

Mr. Passalacqua: No.

(Witness excused.)

The Government then called for its fourth witness, Special Agent of the F. B. I., Patrick Deery, who testified as follows:

Q. Mr. Deery, how long have you been an agent of the F. B. I.?

A. Approximately eight and a half years.

Q. Do you know the defendant Gori?

A. Yes, sir, I do.

Q. Do you know the co-defendant Corbett, who is not on trial today?

A. Yes, sir.

Q. When did you see the defendant Gori for the first time?

A. February 10, 1958.

Q. At about what time?

A. Late in the evening, six o'clock.

The Court: Please keep your voice up.

The Witness: Yes, sir.

Q. Were you alone or were you with another agent?

A. No, I was with other agents.

Q. Where did you see the defendant?

A. I saw him in his automobile in the lower part of Manhattan, or Brooklyn.

We observed his automobile at that time.

[fol. 21] Q. Do you recall the type of automobile he had?

A. Yes, he had a—

The Court: Mr. Passalacqua, please do not get immaterial evidence in here. I admonish you not to.

Did you have a talk with him, yes or no?

Mr. Passalacqua: Your Honor, will please allow me—

The Court: No, I won't allow you to try your ease your way, because if you try it your way, we are going to have another mistrial.

Mr. Passalacqua: Your Honor, I think—please allow me—

The Court: I will give you the whole field. When I think you ought to stop, I will stop you.

Go ahead, you try your case your own way.

Mr. Passalacqua: Thank you.

Q. Did you observe the defendant on February 11, 1958?

The Court: Excluded.

Mr. Gottesman: Objection.

A. Yes.

Q. When did you see the defendant Gori for the first time?

Mr. Gottesman: Objection.

The Court: That has been already answered, February 10th.

Q. When did you see him for the second time? February—

The Court: Excluded. You haven't even proved he saw him the second time.

Q. Did you see him after February 10, 1958? Yes, I did. [fol. 22] Q. Was he alone? He met another individual.

Q. Where did you see him on February 11th—

The Court: If you ask one more question that alludes to suspicion, I will withdraw a juror and put this case over to January of next year.

Now, I want this crime proved, not nine others.

Mr. Passalacqua: I am not referring—

The Court: That is exactly what you are going to lead this jury to believe.

These agents are helpless. They have got to—

Juror No. 1, step out.

I declare a mistrial and I don't care whether the action is dismissed or not.

I declare a mistrial because of the conduct of the district attorney.

Mr. Passalacqua: I am not—

The Court: You heard me. I don't want any more District Attorneys coming down here telling me how I am going to try the cases. And tell your chief if he doesn't want to put any more cases on before me, it is alright with me. That's all.

* * * * * * *

In this case the record shows that during the direct examination of Special Agents, Stewart and Deery, your deponent used a line of questioning tending to elicit what he considered proper, material and relevant facts leading to

the arrest of the defendants when found in possession of the stolen merchandise.

However, the Court felt that this line of questioning by your deponent, would perhaps elicit answers tending to show other crimes which the jury might infer were also committed by the defendants.

[fol. 23] From what has been shown, the Court, in its opinion, taking all the circumstances into consideration felt that the ends of justice may well have been defeated if the case had been allowed to be concluded..

Wherefore, your deponent respectfully requests that the motion to bar a second trial of the defendant Gori, and such further relief, be in all respects denied.

(Sworn to by Peter A. Passalacqua on March 13, 1959.)

[fol. 24]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Appearances:

Nathan Gottesman, Esq., Attorney for the Defendant Gori. For the Motion.

Cornelius W. Wickersham, Jr., Esq., United States Attorney,

By Peter A. Passalacqua, Esq., Assistant U. S. Attorney, In Opposition.

OPINION BY RAYFIEL, D.J. ON MOTION TO DISMISS SUPERSEDING INFORMATION, ETC.—March 26, 1959

Rayfiel, J.

This is a motion by the defendant, Dante Edward Gori, for an order dismissing the information herein on the following grounds:

(1) that the information does not state facts sufficient to constitute an offense against the United States,

(2) that the defendant has been placed in double jeopardy in that he was previously tried for the offense charged in said information and a mistrial was declared by the Court due to no fault on the part of the defendant.

The first ground urged is without merit. The information follows generally the language of the statute involved, [fol. 25] §659 of Title 18, U. S. Code, and complies in all respects with Rule 7(c) of the Federal Rules of Criminal Procedure.

As to the second ground urged by the defendant, the facts are as follows:—the trial of the case was commenced on February 4, 1959, and on that day, and during the presentation of the Government's case, the trial judge, apparently believing that certain questions asked of Government witnesses on direct examination were or might be prejudicial to the defendant, sua sponte exercised his prerogative and declared a mistrial. Though not sought by the defendant, the mistrial was obviously declared in his interest, and was not based on the kind of jeopardy which would bar a second trial herein. The Supreme Court, in the case of Wade vs. Hunter 336 U. S. 684, had occasion to discuss very fully the rule to be applied on this question, and Mr. Justice Black, stated at page 688 that "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.

When justice requires that a particular trial be discontinued is a question that should be decided by persons conversant with factors relevant to the determination. The guiding rule of federal courts for determining when trials should be discontinued was outlined by this Court in United States v. Perez, 9 Wheat. 579. In that case the trial judge without consent of the defendant or the Government discharged the jury because its members were unable to agree. The defendant claimed that he could not be tried again and

prayed for his discharge as a matter of right. In answering the claim this Court said at p. 580:

'. . . We think, that in all cases of this nature, the law has invested Courts of justice with the authority to dis- [fol. 26] charge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this as in other cases, upon the responsibility of the Judges, under their oaths of office. . . .'

The rule announced in the Perez case has been the basis for all later decisions of this Court on double jeopardy. It attempts to lay down no rigid formula. *Under the rule a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice.*" (Emphasis added.)

The motion is in all respects denied. Submit order.

Dated: March 26, 1959

Leo F. Rayfiel, United States District Judge.

[fol. 36]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

JUDGMENT AND COMMITMENT—April 30, 1959

On this 30th day of April, 1959 came the attorney for the government and the defendant appeared in person and with counsel,

It Is Adjudged that the defendant has been convicted upon Verdict of guilty, of the offense of Violating T. 18, U.S.C., Section 659, in that on or about February 11, 1958, within the Eastern District of New York; defendant with another did receive and have in their possession 22 Cases of women's and children's gloves, valued at more than $100.00, which said cases had been stolen while moving as part of and constituting an interstate shipment of freight as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three and one-half (3½) years.

[fol. 37] It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Walter Bruchhausen, United States District Judge.

[fol. 38]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

ORDER APPEALED FROM

A motion having been made by the defendant, Dante Edward Gori, for an order dismissing the information herein on the following grounds:

(1) that the information does not state facts sufficient to constitute an offense against the United States,

(2) that the defendant has been placed in double jeopardy in that he was previously tried for the offense charged in said information and a mistrial was declared by the Court due to no fault on the part of the defendant, and said motion having been heard before the Honorable Leo F. Rayfiel on the 17th day of March 1959, and

Upon the motion papers herein submitted by Nathan Gottesman, Esq., in support of said motion, and Cornelius W. Wickersham, Jr., United States Attorney for the Eastern District of New York, by Peter A. Passalacqua, Assistant United States Attorney, in opposition thereto, and

Upon the opinion of the Court herein rendered on March 26, 1959, it is hereby

Ordered that the said motion be and the same hereby is in all respects denied.

Dated: Brooklyn, New York
July 22, 1959

Leo F. Rayfiel, U. S. D. J.

[fol. 45]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 262—October Term, 1959.

(Argued March 11, 1960)

Docket No. 26048

UNITED STATES OF AMERICA, Appellee,

—v.—

DANTE EDWARD GORI, Defendant-Appellant.

OPINION—July 22, 1960

Before: Lumbard, Chief Judge, and Clark, Waterman, Moore, and Friendly, Circuit Judges.

Appeal from the United States District Court for the Eastern District of New York, Leo F. Rayfiel and Walter Bruchhausen, Judges.

Dante Edward Gori appeals from the denial by Judge Rayfiel of his motion to dismiss, on his plea of former jeopardy, an information charging him with having knowingly received and possessed goods stolen in interstate commerce in violation of 18 U. S. C. §659, and from his conviction of the offense charged after trial before Judge Bruchhausen and a jury. Affirmed.

[fol. 46] Jerome Lewis, Brooklyn, N. Y., for defendant-appellant.

Cornelius W. Wickersham, Jr., U. S. Atty., E. D. N. Y., Brooklyn, N. Y. (Margaret E. Millus, Asst. U. S. Atty., Brooklyn, N. Y., on the brief), for appellee.

Clark, Circuit Judge:

This appeal, based upon the defendant-appellant's plea of former jeopardy to avoid a criminal conviction, came for hearing before a panel of this court consisting of Judge Waterman and the writer from this Circuit and Judge Lewis of the Tenth Circuit, sitting with us pursuant to statutory designation. In conference the court was in disagreement, Judges Waterman and Lewis voting to reverse and the writer voting to affirm. Draft opinions reflecting this disagreement, together with the briefs, record, transcript, and appendix, were then circulated among the active judges, a majority of whom, believing that the case presented a general problem important to the administration of justice in this circuit, thereupon voted for disposition of the appeal *in banc*, 28 U. S. C. §46(c).[1] Four active judges having then voted to affirm, the writer was assigned to prepare an opinion reflecting this prevailing view. [fol. 47] The defendant was charged with having knowingly received and possessed goods stolen in interstate commerce in violation of 18 U. S. C. §659. The trial got under way before Judge Abruzzo on February 4, 1959, after the declaration of a mistrial on the previous day.[2] From the opening by counsel it appeared that the defendant would not contest his receipt and possession of stolen goods on February 11, 1958, with the codefendant Corbett—who pleaded guilty—but would claim that he acted without knowledge

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[1] Although disagreeing with the conclusion of the panel majority, the writer did not vote for the *in banc* procedure. In his experience such procedure does not reconcile differences, but in fact accentuates them. Hence it should be reserved for clarifying issues otherwise presented ambiguously or in a one-sided fashion. Here the important issue seemed fully presented, and there was the added difficulty of superseding the judgment of a distinguished visitor who had graciously complied with our request for help. Though we have acted similarly in other cases, it appears not to be a settled practice in other circuits. See, e.g., *National Latex Products Co.* v. *Sun Rubber Co.*, 6 Cir., 276 F. 2d 167.

[2] No point was made on this appeal as to this mistrial, which appears to have been granted upon motion of defendant after associate defense counsel was observed talking with one of the jurors.

of their character and only as Corbett's hired employee. The Assistant United States Attorney attempted to prove this fairly simple case first by the testimony of the shipper's traffic manager, second by the truckman from whose truck the goods were stolen, and third by two FBI Special Agents investigating the theft. He ran into repeated difficulty, however, in part because of continuous formal objections by the defense, but even more by interference on the part of the trial judge, who repeatedly ordered the reframing of questions and otherwise took the conduct of the case away from him. The trial continued its rocky course throughout the morning and early afternoon until upon the examination of the fourth witness, Special Agent Deery, there occurred the colloquy set forth in the margin resulting in the declaration of a mistrial by the judge.[3] Later Judge Rayfiel in a

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[3] "PATRICK JOSEPH DEERY, a witness called on behalf of the Government, having been duly sworn, was examined and testified as follows:

"*Direct Examination by Mr. Passalacqua*:

"Q. Mr. Deery, how long have you been an agent of the F. B. I.? A. Approximately eight and a half years.

"Q. Do you know the defendant Gori? A. Yes, sir, I do.

"Q. Do you know the co-defendant Corbett, who is not on trial today? A. Yes, sir.

"Q. When did you see the defendant Gori for the first time? A. February 10, 1958.

"Q. At about what time? A. Late in the evening, six o'clock.

"The Court: Please keep your voice up.

"The Witness: Yes, sir.

"Q. Were you alone or were you with another agent? A. No, I was with other agents.

"Q. Where did you see the defendant? A. I saw him in his automobile in the lower part of Manhattan, or Brooklyn. We observed his automobile at that time.

"Q. Do you recall the type of automobile he had? A. Yes, he had a—

"The Court: Mr. Passalacqua, please do not get immaterial evidence in here. I admonish you not to. Did you have a talk with him, yes or no?

"Mr. Passalacqua: Your Honor, will you please allow me—

"The Court: No, I won't allow you to try your case your way, because if you try it your way, we are going to have another mistrial.

(*footnote continued on next page*)

[fol. 48] reasoned opinion, denied defendant's motion to dismiss the information on plea of former jeopardy, and [fol. 49] he was convicted and sentenced to imprisonment after a jury trial before Chief Judge Bruchhausen. He now appeals from both these actions of the district court, but relies only on the claim of former jeopardy and assigns no error as to his trial before Judge Bruchhausen.

The colloquy set forth in the margin demonstrates that the prosecutor did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions. This is borne out by the entire transcript, including also that covering the morning

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"Mr. Passalacqua: Your Honor, I think—please allow me—

"The Court: I will give you the whole field. When I think you ought to stop, I will stop you. Go ahead, you try your case your own way.

"Mr. Passalacqua: Thank you.

"Q. Did you observe the defendant on February 11, 1958?

"The Court: Excluded.

"Mr. Gottesman: Objection.

"A. Yes.

"Q. When did you see the defendant Gori for the first time?

"Mr. Gottesman: Objection.

"The Court: That has been already answered, February 10th.

"Q. When did you see him for the second time? A. February—

"The Court: Excluded. You haven't even proved he saw him the second time.

"Q. Did you see him after February 10, 1958? A. Yes, I did.

"Q. Was he alone? A. He met another individual.

"Q. Where did you see him on February 11th—

"The Court: If you ask one more question that alludes to suspicion, I will withdraw a juror and put this case over to January of next year. Now, I want this crime proved, not nine others.

"Mr. Passalacqua: I am not referring—

"The Court: That is exactly what you are going to lead this jury to believe. These agents are helpless. They have got to—. Juror No. 1, step out. I declare a mistrial and I don't care whether the action is dismissed or not. I declare a mistrial because of the conduct of the district attorney.

"Mr. Passalacqua: I am not—

"The Court: You heard me. I don't want any more District Attorneys coming down here telling me how I am going to try the cases. And tell your chief if he doesn't want to put any more cases on before me, it is all right with me. That's all."

session. Nor does it make entirely clear the reasons which led the judge to act, though the parties appear agreed that he intended to prevent the prosecutor from bringing out evidence of other crimes by the accused. Even so, the judge should have awaited a definite question which would have permitted a clear-cut ruling. But if he was thus over-assiduous, pursuing the command role which he had assumed for himself, it seems clear that he was acting according to his convictions in protecting the rights of the accused. The defense now urges that the judge was endeavoring to punish counsel's disobedience, but such a characterization, even if apt, adds nothing significant to his over-all purpose; and as to this the defense elsewhere states, "It is undeniable that the trial court was concerned with protecting the rights of the appellant." It is to be noted that the defendant made the original objections leading to the order of mistrial and that he made or attempted no protest to the order itself, but accepted the [fol. 50] benefit of the new trial. We have the issue, therefore, whether active and express consent—something beyond acquiescence—is required to prevent this defendant, now convicted after a concededly fair trial, from receiving absolution for his crime by reason of the overzealousness of the trial judge on his behalf. A majority of this court concludes that the federal law does not so command.

The mandate of the Fifth Amendment to the United States Constitution is " * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * * ." In considering whether the declaration of a mistrial precludes a subsequent prosecution for the same offense the Supreme Court has rejected any rigid formularization of the constitutional requirement in favor of a flexible application of the prohibition. *Wade* v. *Hunter*, 336 U. S. 684, 690. This approach originated in *United States* v. *Perez*, 22 U. S. (9 Wheat.) 579, 580, where Justice Story stated: "We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are

to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere." This controlling principle was succinctly reiterated in *Brock* v. *North Carolina*, 344 U. S. 424, 427:

> "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served. *Wade* v. *Hunter*, 336 U. S. 684; *Thompson* v. *United States*, 155 U. S. 271, 273-274. As was said in *Wade* v. *Hunter*, *supra*, p. 690, 'a [fol. 51] trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice.'"

To the same effect are *Lovato* v. *New Mexico*, 242 U. S. 199; *Simmons* v. *United States*, 142 U. S. 148; *United States* v. *Cimino*, 2 Cir., 224 F. 2d 274; *United States* v. *Potash*, 2 Cir., 118 F. 2d 54, certiorari denied *Potdsh* v. *United States*, 313 U. S. 584; *Scott* v. *United States*, D. C. Cir., 202 F. 2d 354, certiorari denied 344 U. S. 879; *United States* v. *Giles*, D. C. W. D. Okl., 19 F. Supp. 1009. It is to be noted that in none of these cases is the element of consent by the accused held necessary to obviate the constitutional bar; in fact, they are authority for the contrary view. Actually in several the mistrial had been declared either on the motion of the prosecution or by the court of its own motion, but over the vigorous opposition of the defense; this was the situation in the *Simmons*, *Scott*, and *Giles* cases, as well as in the *Brock* case, which concerned a state conviction reviewed under the Fourteenth Amendment.[4] In yet others, as in *Lovato*, *Cimino*, and *Potash*, it had been declared on the government's or the court's motion, with no showing of express consent by the

[4] So in *Forman* v. *United States*, 361 U. S. 416, where the Court of Appeals had originally reversed a conviction and directed an acquittal, but later modified this to direct a new trial, on motion of the government and against defense objection, the Supreme Court rejected the plea of double jeopardy.

accused. In all these the ultimate conviction was upheld against the plea of double jeopardy.

The defendant relies on *Himmelfarb* v. *United States*, 9 Cir., 175 F. 2d 924, certiorari denied 338 U. S. 860, as showing the need of consent; but such was not the court's approach there. Accepting the now well settled view that waiver or consent by the defendant barred his later re- [fol. 52] sort to the plea,[5] the court first considered and held ineffective a waiver by counsel without his client's specific assent. Having thus cleared the way, it passed to the "real issue presented," which was "whether or not there was a legal necessity supporting the discharge of the first jury." And this it considered at considerable length with a wealth of learning and citation of authority, concluding: "We think the court did not abuse its discretion." So the denial of the plea was upheld and the conviction was *affirmed*. To similar effect are cases such as *Ex parte Glenn*, C. C. N. D. W. Va., 111 Fed. 257, reversed on other grounds *Moss* v. *Glenn*, 189 U. S. 506, and *United States* v. *Watson*, D. C. S. D. N. Y., 28 Fed. Cas. No. 16,651. Thus while consent may bar resort to the plea, its absence does not relieve the judge of responsibility and discretion to discontinue a particular trial when justice so requires. *Wade* v. *Hunter*, *supra*, 336 U. S. 684, 689.

The law as thus stated comports more with our fundamental concepts of the federal administration of criminal justice than does the rigid and inflexible rule contended for by the accused. It has been a source of pride federal-wise that a United States district judge is more than a mere automaton or referee and bears an affirmative responsibility for the conduct of a criminal trial. This responsibility is particularly acute in the avoidance of prejudice arising from nuances in the heated atmosphere of trial, which cannot be fully depicted in the cold record on appeal. If the accused retains essentially a power of veto

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[5] See, e.g., *Blair* v. *White*, 8 Cir., 24 F. 2d 323; *Barrett* v. *Bigger*, D. C. Cir., 17 F. 2d 669, certiorari denied 274 U. S. 752; *United States* v. *Harriman*, D. C. S. D. N. Y., 130 F. Supp. 198, 204, notwithstanding Mr. Justice Holmes' view to the contrary stated in *Kepner* v. *United States*, 195 U. S. 100, 136.

on pain of ban of all prosecution, even though fully justified, it is clear that the judge does not retain control of [fol. 53] his courtroom and cannot act as he thinks necessary either to protect the interests of the litigants or to preserve proper respect for federal law administration. Even though there may be a rare case where in retrospect the judge may seem to have been overzealous in his protection of the rights of an accused, we think the law is better served by the preservation of the responsibility which the federal precedents impose upon him.

On this basis we do not believe decision should be difficult, for the responsibility and discretion exercised by the judges below seem to us sound. Here the defendant was in no way harmed by the brief trial which, indeed, revealed to him the prosecution's entire case. He was thus in a position to start anew with a clean slate, with all possibility of prejudice eliminated and with foreknowledge of the case against him. The situation was quite unlike the more troublesome problems found in various of the cases, as where the prosecution desires to strengthen his case on a new start or otherwise provokes the declaration of mistrial, or the court has acted to the prejudice of the accused, or the accused has actually been subject to two trials for essentially the same offense.[6] On the other hand,

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[6] See full discussion in *United States* v. *Sabella*, 2 Cir., 272 F. 2d 206, and *Green* v. *United States*, 355 U. S. 184, a 5–4 decision where the two opinions are notable for their historical exegesis of the plea. The question in *Green* was as to jurisdiction, after reversal on appeal, to retry the accused for the greater offense of which he had been originally acquitted. But the majority, in sustaining the plea and pointing out that it "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict," reiterate, 355 U. S. at page 188: "At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforeseeable circumstances * * * arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict.' *Wade* v. *Hunter*, 336 U. S. 684, 688-689." In *United States* v. *Whitlow*, D. C. D. C., 110 F. Supp. 871—a case criticized in 67 Harv. L. Rev. 346 (1953) for inflexibility—the court upheld the plea when the mistrial had been declared because of the misconduct of the defendant's counsel.

[fol. 54] for the defendant to receive absolution for his crime, later proven quite completely, because the judge acted too hastily in his interest, would be an injustice to the public in the particular case and a disastrous precedent for the future.

I am authorized to say that Chief Judge Lumbard and Judges Moore and Friendly concur in this opinion.

Conviction affirmed.

WATERMAN, Circuit Judge (dissenting):

It is quite clear that the district judge, on February 4, 1959, ordered a mistrial because of actions which he believed to constitute trial misconduct on the part of the Assistant United States Attorney.[1] Accordingly, it must first be asked if a mistrial for this reason may be ordered by a district judge, acting entirely *sua sponte*, without giving rise subsequently to valid plea of former jeopardy under the Fifth Amendment. If not, a second question arises: did the defendant here expressly or impliedly request or consent to the mistrial order? I believe that both these questions must be answered in the negative, and therefore I dissent.

The former jeopardy clause of the Fifth Amendment reads as follows: "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *" The clause consistently has been interpreted not only to forbid multiple punishment for the same offense but also to forbid successive exposures to a single punishment. *United States* v. *Ball*, 163 U. S. 662, 666-71 (1896); *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 169 (1873 Term); and see also *United States* v. *Sabella*, 272 F. 2d 206, 208-10 (2 Cir. 1959). Thus, once a jury has been impaneled [fol. 55] and sworn[2] it is said jeopardy attaches, and if a

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[1] The district judge stated: "I declare a mistrial because of the conduct of the district attorney."

[2] In a non-jury case it is stated that jeopardy attaches once the defendant has pleaded and the court has begun to hear evidence. *Clawans* v. *Rives*, 104 F. 2d 240, 242 (D. C. Cir. 1939); *McCarthy* v. *Zerbst*, 85 F. 2d 640, 642 (10 Cir. 1936), cert. denied, 299 U. S. 610.

mistrial is then ordered, subsequent prosecution is barred, *Green v. United States*, 355 U. S. 184, 188 (1957); *Bassing v. Cady*, 208 U. S. 386, 391 (1908); *McCarthy v. Zerbst*, 85 F. 2d 640, 642 (10 Cir. 1936), *cert. denied*, 299 U. S. 610; *Cornero v. United States*, 48 F. 2d 69 (9 Cir. 1931); *Ex parte Ulrich*, 42 Fed. 587 (W. D. Mo. 1890), *app. dismissed*, 489 U. S. 789, unless the defendant has consented to the mistrial order, *Blair v. White*, 24 F. 2d 323 (8 Cir. 1928); *Barrett v. Bigger*, 17 F. 2d 669 (D. C. Cir. 1927), *cert. denied*, 274 U. S. 752; *United States v. Harriman*, 130 F. Supp. 198, 204 (S. D. N. Y. 1955). It is settled that a plea of former jeopardy does not lie when a mistrial is ordered because of the jury's inability to reach an agreement after submission, *Keerl v. Montana*, 213 U. S. 135 (1909); *Dreyer v. Illinois*, 187 U. S. 71, 84-87 (1902); *Logan v. United States*, 144 U. S. 263, 297-98 (1892); *United States v. Perez*, 9 Wheat. (22 U. S.) 579 (1824 Term), or when a juror is discovered to be incompetent or becomes incapacitated, *Thompson v. United States*, 155 U. S. 271 (1894); *Simmons v. United States*, 142 U. S. 148 (1891); *United States v. Potash*, 118 F. 2d 54 (2 Cir. 1941), *cert. denied*, 313 U. S. 584; *United States v. Haskell*, 26 Fed. Cases No. 15, 321 (E. D. Pa. 1823 Term). There are also cases disallowing the plea of former jeopardy when the mistrial order resulted from the courtroom conduct of particular persons. Prior to this case the prosecuting attorney has not been included in this group. See *United States v. Cimino*, 224 F. 2d 274 (2 Cir. 1955) (exclamations of a juror); *Scott v. United States*, 202 F. 2d 354 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 879, 881 (withdrawal of associate counsel ap-
[fol. 56] pointed by the court); *United States v. Giles*, 19 F. Supp. 1009 (W. D. Okla. 1937) (exclamations of a trial judge questioning Government's good faith in prosecuting); but cf. *United States v. Whitlow*, 110 F. Supp. 871 (D. C. D. C. 1953) (misconduct of defendant's counsel held too minor to nullify plea of former jeopardy). For reasons to be set forth subsequently I am of the opinion that a mistrial ordered because the trial judge believed that the prosecuting attorney was guilty of misconduct presents a different problem than that presented in these cases.

All the cases purporting to be exceptions to the rule that a mistrial may not be ordered without the defendant's consent "once jeopardy has attached" rely upon the authority and rationale of *United States* v. *Perez*, *supra*. There, at page 580, Justice Story said:

> "We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office."

[fol. 57] Without in any way disagreeing with the result in the *Perez* case or with the results in the cases which have relied upon it, I submit that as a guide for determining when subsequent prosecution is to be barred by the former jeopardy clause of the Fifth Amendment, Justice Story's discussion in *Perez* is analytically inadequate. If the former jeopardy clause is to be taken seriously as a constitutional right of criminal defendants and if one accepts the principle that jeopardy attaches at the commencement of trial, it defies analysis to hold that this constitutional right can *always* be nullified by some discretionary act on the part of the judge at the first trial.[3] The inadequacy of such a "dis-

[3] In *Cornero* v. *United States*, 48 F. 2d 69, 72 (9 Cir. 1931) it was suggested that when the *Perez* opinion referred to the discretion of the trial judge it contemplated the discretion involved in determining how long the jury should be required to deliberate prior to its discharge for having failed to reach a verdict.

cretionary" rationale becomes peculiarly apparent in the present case. The majority opinion is at pains to demonstrate the propriety of the Assistant United States Attorney's conduct. They state that the Assistant United States Attorney did nothing to instigate a mistrial, that he merely performed his assigned duties "under trying conditions." The action of the district judge in ordering the mistrial, expressly characterized as "over-assiduous" and "over-zealous," is thus clearly regarded by my colleagues as having been a mistaken action. How then can it be said that the district judge did *not abuse* his discretion in ordering a mistrial? I cannot follow my colleagues on this issue; the result they reach is to me a *non sequitur*. However, my dissent is based upon other grounds, for I believe the question before us should be resolved without any reliance whatever upon amorphous principles of discretion.

Even if all other questions in the law of former jeopardy remain unsettled it is clear that in the one case where the [fol. 58] trier of fact has fully considered the evidence against a defendant and the defendant has been acquitted that man may not thereafter be prosecuted for the same offense. *United States* v. *Ball*, 163 U. S. 662, 669-70 (1896). As a corollary, a prosecuting attorney, sensing that the trier of fact will acquit if the case being tried is completed, may not enter a "nolle prosequi" during the trial without the bar of former jeopardy attaching. See *Green* v. *United States*, 355 U. S. 184, 188 (1957); *Cornero* v. *United States*, 48 F. 2d 69, 71 (9 Cir. 1931); *Ex parte Ulrich*, 42 Fed. 587, 595 (W. D. Mo. 1890); *app. dism'd*, 189 U. S. 789; *United States* v. *Shoemaker*, 27 Fed. Cases No. 16,279 (D. Ill. 1840); and cf. Frankfurter, *J.*, concurring, *Brock* v. *North Carolina*, 344 U. S. 424, 428-29 (1953). Therefore, what the prosecuting attorney is forbidden to do directly by nolle he ought not to be permitted to do indirectly by way of trial misconduct. I would hold that misconduct by a prosecuting attorney during trial may not deprive a defendant without his consent of the right to have that trial completed.

So far as I have been able to discover, of the cases permitting retrial subsequent to a mistrial that had been ordered after the initial trial had begun, in only two have the factors that produced the mistrial order been within the

control of the prosecution. These two cases are *Wade* v. *Hunter*, 336 U. S. 684 (1949), *reh'g denied*, 337 U. S. 921, and *Lovato* v. *New Mexico*, 242 U. S. 199 (1916) and neither case contradicts the conclusion expressed in the preceding paragraph. *Wade* v. *Hunter* involved court martial proceedings initiated at the front during the invasion of Germany during the Second World War. There the Court, at pages 691-92, found "extraordinary reasons" justifying adjournment of the first trial. The circumstances of the *Wade* case would appear to objectively preclude any possibility that the adjournment ordered there resulted from a fear that the trier of fact would decide against the prosecu- [fol. 59] tion. Similarly, the abuse was objectively impossible under the facts in *Lovato*. There the identical jury which had been discharged so that the defendant could be arraigned prior to trial was reimpaneled to hear the case after the defendant's arraignment.

The references throughout this opinion to "misconduct" on the part of the Assistant United States Attorney should not be taken as indicating that, on this point, I am in accord with the District Judge and, with him, believe that the conduct of the Assistant United States Attorney was improper. I agree with my colleagues that the Assistant United States Attorney attempted conscientiously to present his case in a manner consistent with the rulings of the district judge. However, the significant fact is the district judge's belief. This erroneous belief deprived appellant of his right to take his case to the jury as the jury was then constituted. It is implicit in the former jeopardy clause that, as in criminal proceedings generally, the injurious consequences of erroneous rulings by the trial judge have to be borne by the prosecution rather than by the defendant.

Furthermore, although we reach contrary conclusions, I agree with my colleagues that the correct disposition of the issue before us does not depend upon whether the district judge was acting to protect the defendant or whether he was acting to punish imagined disobedience. If the former, I maintain that the district judge must give the defendant the right to decide whether his interests will be better protected by having a new trial or by proceeding with the present one. The defendant here was denied that choice:

his retrial should not be permitted. If the latter, I think it equally clear that the maintenance of a court's authority and of a trial judge's control of a trial cannot be had at the expense of a defendant's constitutional rights.

[fol. 60] I conclude that a district judge, acting *sua sponte*, does not have power to order a mistrial because of trial misconduct by the prosecuting attorney without giving rise to a sustainable plea of former jeopardy should retrial be attempted. Thus it becomes necessary to consider whether this appellant in some manner may be said to have consented to the mistrial order.

Although I find the court's opinion unclear on this point, it may be that my colleagues imply consent from two actions by appellant during the trial. My colleagues mention the fact that appellant made objections which might have led to the mistrial order, and they also mention that he did not protest the order itself.

As to the first ground, objections to testimony cannot be said to constitute consent to a subsequent mistrial order, for objections to testimony obviously assume that the trial is to continue. Moreover, as a matter of policy, I oppose a rule that would inhibit defense counsel from making objections during a trial lest, by objecting, counsel be found to have consented, in advance, to a mistrial order. Finally, I think the part the defendant's objections played in leading to the mistrial order in the present case has been overemphasized in the court's opinion.[1]

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[1] My colleagues refer to the defense's "continuous formal objections." This is misleading. At the morning session only did the defense interpose frequent objections. The first government witness, the shipper's traffic manager, was then testifying. Primarily these objections were directed to the admissibility of certain bills of lading. The district judge consistently overruled the defense, and the frequency of the objections was caused in part from the district judge's admonition to the defense to preserve this point. The district judge did not display notable impatience with the conduct of the Assistant United States Attorney or rule favorably to the defense until the abbreviated testimony of the third and fourth government witnesses, the two FBI agents, who testified in the afternoon. The district judge's displeasure with the trial conduct of the Assistant United States Attorney during their examination, a displeasure that I join my colleagues in being unable

[fol. 61] As to the contention that consent may be implied from appellant's failure to object to the mistrial order, similar contentions were made and rejected in *Himmelfarb* v. *United States*, 175 F. 2d 924, 931-32 (9 Cir. 1949), *cert. denied*, 338 U. S. 860; *Ex parte Glenn*, 111 Fed. 257, 259 (N. D. W. Va. 1901), *rev'd on other grounds*, 189 U. S. 506; *United States* v. *Watson*, 28 Fed. Cases No. 16,651 (SDNY 1868). Under different circumstances than here present one court may have implied consent from a failure to object to a mistrial order. In *Scott* v. *United States*, 202 F. 2d 354 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 879, 881, during the absence of the jury but in the presence of the defendant and his attorney, the trial judge stated he had decided to declare a mistrial. The jury was then called back into the courtroom and the order announced. During this time no objection was made. In the present case, however, the possibility of a mistrial had not been suggested until almost immediately before the district judge angrily ordered a juror discharged. The suddenness and vehemence of the order renders it highly unrealistic for us to imply consent here from appellant's failure to protest.

I would reverse with directions to dismiss the information.

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to account for, was not instigated by defense counsel, whose role during this portion of the trial was entirely passive. The trial record discloses that neither counsel anticipated the course so suddenly taken and that the withdrawal of the juror must have been as much of a surprise to defense counsel as it was to the Assistant United States Attorney.

[fol. 62]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

DANTE EDWARD GORI, Defendant-Appellant,
FRANKLIN OSBORN CORBETT, Defendant.

JUDGMENT—July 22, 1960

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk. By Niall F. O'Doherty, Chief Deputy Clerk.

[fol. 63] [File endorsement omitted]

[fol. 84]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 262—October Term, 1959.

(Petition filed August 5, 1960)

Docket No. 26048

UNITED STATES OF AMERICA, Appellee,

—v.—

DANTE EDWARD GORI, Defendant-Appellant.

Before: Lumbard, Chief Judge, and Clark, Waterman, Moore, and Friendly, Circuit Judges.

On Petition of Appellant for Rehearing

Jerome Lewis, Brooklyn, N. Y., for appellant.

PER CURIAM ON PETITION FOR REHEARING—August 18, 1960

On the merits of this appeal we find nothing to add to the discussions already had. Appellant, however, objects to the procedure *in banc* followed here and claims a right of oral argument. This is a point we should discuss, since counsel generally should be apprised of our procedure so far as we have developed it. There is of course nothing secret as to our processes of advancing a case to the point of adjudication.

[fol. 85] We have recently adopted our Rule 25(b) dealing with petitions for rehearing. This reads as follows:

"(b) *Disposition.* Any petition for rehearing shall be addressed to the court as constituted in the original hearing. It shall be disposed of by the court as so constituted unless a majority of said court or any active judge of this court, either from a suggestion by petitioner or *sua sponte*, shall be of the opinion that the case should be reheard in banc, in which event the Chief Judge shall cause that issue to be determined by the active judges of this court. Rehearing, whether by the court as constituted in the original hearing or in banc, shall be without oral argument and upon the papers then before the court, unless otherwise ordered." (Eff. April 25, 1960.)

But additionally the court reserves the right, as the statute, 28 U. S. C. §46(c), provides, to proceed *in banc* whenever a majority of the active judges think such course in the interest of justice and so vote. This necessarily involves the exercise of discretion in each particular case and we have kept formal rules to a minimum. So when the procedure *in banc* has been voted, we have proceeded to decision on only the original papers, *McWeeney* v. *New York, N. H. & H. R. Co.*, 2 Cir., July 29, 1960; *Sperry Rand Corp.* v. *Bell Telephone Laboratories*, 2 Cir., 272 F. 2d 29; *Mueller* v. *Rayon Consultants*, 2 Cir., 271 F. 2d 591; *Reardon* v. *California Tanker Co.*, 2 Cir., 260 F. 2d 369, 375, certiorari denied *California Tanker Co.* v. *Reardon*, 359 U. S. 926; *F. & M. Schaefer Brewing Co.* v. *United States*, 2 Cir., 236 F. 2d 889, reversed *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U. S. 227, or on the mere filing of additional briefs, *American-Foreign S.S. Corp.* v. *United States*, 2 Cir., 265 F. 2d 136, 144, vacated and remanded *United* [fol. 86] *States* v. *American-Foreign S.S. Corp.*, 80 S. Ct. 1336; *In re Lake Tankers Corp.*, 2 Cir., 235 F. 2d 783, affirmed *Lake Tankers Corp.* v. *Henn*, 354 U. S. 147, or after full oral argument, *Pugach* v. *Dollinger*, 2 Cir., 277 F. 2d 739, certiorari granted 80 S. Ct. 1614; *United States* v. *Coppola*, 2 Cir., May 20, 1960; *U. S. ex rel. Marcial* v. *Fay*, 2 Cir., 247 F. 2d 662, certiorari denied *Fay* v. *U. S. ex rel. Marcial*, 355 U. S. 915; *U. S. ex rel. Roosa* v. *Martin*, 2 Cir., 247 F. 2d 659; *United States* v. *Apuzzo*, 2 Cir., 245 F. 2d

416, certiorari denied *Apuzzo* v. *United States*, 355 U. S. 831; and *United States* v. *Santore*, not yet decided. Thus we have no set rule in this regard, but are guided by what we conclude are the needs of a particular case.

These various cases presented all the questions here adverted to, including the supersession of retired or visiting judges by a court comprised of only the active judges. As appears above, the Supreme Court passed upon many of the cases in their substantive aspects, but without raising any question as to the procedure. Petitioner has no absolute right to oral argument; where, as here appeared, the researches of the court and its staff had proceeded beyond that disclosed in the briefs of counsel, further briefs and oral argument would have been a barren formalism without advantage to the court and counsel and a waste of time for all concerned.

Petition denied.

[fol. 87]

IN UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—August 18, 1960

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk, By Niall F. O'Doherty, Chief Deputy Clerk.

[fol. 89] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 88] [File endorsement omitted]

[fol. 90]

SUPREME COURT OF THE UNITED STATES

No. ..... October Term, 1960

DANTE EDWARD GORI, Petitioner,

v.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 15, 1960

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 17th, 1960.

John M. Harlan, Associate Justice of the Supreme Court of the United States.

Dated this 15th day of September, 1960.

[fol. 91]

SUPREME COURT OF THE UNITED STATES

No. 486, October Term, 1960

[Title omitted]

ORDER ALLOWING CERTIORARI—December 12, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, limited to the question of double jeopardy presented by the petition and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.